

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Thirtieth Region

CARROLL COLLEGE, INC.

Employer

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE & AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA – UAW

Petitioner

Case 30-RC-6594

**DECISION AND DIRECTION OF ELECTION**

Petitioner seeks to represent a unit of all full-time and regular part-time tenured and non-tenured teaching faculty employed by Carroll College, Inc. (the College). The College contends that the National Labor Relations Board (Board) does not have jurisdiction over it because the College is affiliated with the Presbyterian Church, and asserting jurisdiction over the College would implicate First Amendment concerns under Section 20000 bb-2(4) of the Religious Freedom Restoration Act (RFRA). If the Board asserts jurisdiction over the College, then the College argues that the petitioned-for bargaining unit is inappropriate for three reasons. First, faculty members are managerial employees and should be excluded from the unit. Second, faculty members are supervisors under Section 2(11) of the Act and should be excluded from the unit. Third, librarians are the only appropriate unit and/or the librarians share a community of interest with the faculty and must be included with a unit of faculty members. Based on the record and the relevant cases, I find that the Board does have jurisdiction over the College. I also find that the faculty is not managerial or supervisory and that a unit consisting of full-time and

regular part-time tenured and non-tenured faculty is appropriate. Finally, there is insufficient evidence to determine whether the librarians should be included in the unit, and therefore they shall be permitted to vote subject to challenge.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The College is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>1</sup>

3. The labor organization involved claims to represent certain employees of the College.

4. A question affecting commerce exists concerning the representation of certain employees of the College within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. In the first section of this decision I will discuss the facts relating to the jurisdictional issue and then explain why asserting jurisdiction over the College does not raise significant First Amendment issues. The second section of this decision will review the facts pertinent to the managerial issue, discuss the legal principles for determining whether college faculty members are managerial, and then will explain why the College's faculty members are not managerial employees. The third section of this decision will explain why the faculty members are not supervisors under Section 2(11) of the Act. Finally, I will review the few facts in the record

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<sup>1</sup> The College is a private, nonprofit institution of higher learning in Waukesha, Wisconsin. During the past calendar year, a representative period, the College received gross revenues available for operating expenses in excess of \$1 million. During the same period, the College, in the course and conduct of its business operations, purchased and received goods or services valued in excess of \$5,000 from suppliers located outside the State of Wisconsin.

relating to the librarians and discuss why these facts are insufficient to make a determination of whether the librarians have a community of interest with the faculty.

## **JURISDICTION**

### **Facts Relevant To Jurisdiction**

Carroll College is a liberal arts college located in Waukesha, Wisconsin. The College is divided into two schools: the school of liberal arts and science and the school of graduate and professional studies. The College offers 35 liberal arts and professional majors. In the fall of 2003, the College had an enrollment of 2,968 students.

Soon after the College was established in 1846, it “affiliated” with the Presbyterian Church. Today that affiliation is recognized in the Articles of Incorporation, which provide that the College is “related” to the Synod of Lakes and Prairies of the United Presbyterian Church in the U.S.A. (the Church).

The College and the Church are parties to a covenant. The College president described the covenant as “a general agreement on general principles” that the College and Church share. More specifically, the covenant commits the board of trustees to the following: (1) “offer education of high quality committed to the wholeness of life interpreted and illumined by the Christian faith”; (2) continue to be a liberal arts institution that offers classes with a goal of academic excellence; (3) relate to the whole Church; (4) recognize opportunity to provide leadership to the Church; (5) administer Church gifts faithfully; (6) be non-discriminatory in its admissions and employment policies; and (7) “seek to instill in its students the ideals of rigorous pursuit of truth, freedom of thought and investigation, and respect for differing opinions.”

The College’s Mission Statement approved by the board of trustees in 1995 provides in full:

We will provide a superior educational opportunity for our students, one grounded in the liberal arts tradition and focused on career preparation and lifelong learning.

We will demonstrate Christian values by our example.

We shall succeed in our mission when our graduates are prepared for careers of their choice and lives of fulfillment, service and accomplishment.

The board of trustees also adopted a Statement of Christian Purpose. The statement provides in part:

The Christian purpose of Carroll College is summarized in its motto ‘Christo et Litteris’ – for Christ and Learning. By means of a faculty dedicated to the Christian purpose and assured of the academic freedom necessary to the performance of its tasks, the college seeks to provide a learning community devoted to academic excellence and congenial to Christian witness. To this learning community, the college welcomes all inquirers.

The College president testified that the statement “is an attempt to clarify that the Christian values are the underpinning of the institution but to recognize that inquiry will take us in a lot of different directions and people should feel free to speak their minds.”

The board of trustees is the chief governing entity of the College. Currently, there are 33 members of the board of trustees, including the College president and alumni College president. The trustees serve three-year terms. Trustees are not required to be Church members. The board of trustees is self-selected, so the Church has no power to nominate or elect any trustees. The bylaws direct that the trustees must elect three Presbyterian ministers to the board of trustees. Currently, there is one Presbyterian minister on the board, and the College is seeking to fill the other two vacancies. The bylaws direct that trustee nominees should “respect the Christian commitment and will seek to maintain the Christian ideals and purposes of the college.” The president testified that this is a subjective requirement.

The articles of incorporation prohibit the establishment of any requirements that limit the admission of students, election of trustees, or appointment of faculty to members of the Presbyterian denomination. Additionally, there is no evidence that faculty are required to subscribe to the Christian faith or to teach or promote Church values. The College president testified that the College would not exclude from the faculty anyone that held a world view different than the Christian world view.

The majority of the College's revenue, approximately 70 percent, comes from student tuition. The remaining revenue is derived from fundraising and endowment draw. There is no evidence indicating whether any of the College's revenue comes from the Church. The College owns the property it is located on.

There is no evidence that students are required to attend religious services or even that religious services are offered on campus. While the articles of incorporation require students to take one religious course (4 credits) to graduate, the faculty has interpreted this requirement broadly. Students may satisfy this requirement by taking and passing classes that deal with values and ethics but are not specifically in the religion department. Some examples of classes that students may take to complete the religious course requirement include "Bioethics," "Literature in Black America" and "Playing Crazy: Cultural Constructions of Madness."

### **Asserting Jurisdiction Does Not Implicate First Amendment Concerns**

In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979), the United States Supreme Court held that the Board did not have jurisdiction over teachers in a church-operated high school because the Board's exercise of jurisdiction could require "the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion

Clauses.”<sup>2</sup> In Trustee of St. Joseph’s College, the Board concluded that the Court’s holding in Catholic Bishop “applies to all schools regardless of the level of education provided.” 282 NLRB 65, 67-8 (1986). The Board noted that it would consider on a case-by-case basis whether exercise of its jurisdiction would implicate First Amendment concerns. Id. at 68.

In St. Joseph’s, the Board examined the relationship between St. Joseph’s and the Sisters of Mercy of Main (the Order). The Board concluded that St. Joseph’s exhibited numerous characteristics of a church-operated school. St. Joseph’s was financially dependent on the Order. The Order exercised administrative control over St. Joseph’s by virtue of the requirement that all trustees had to be members of the Order. The Bishop of Portland had the ability to determine what books to use and to remove faculty if their conduct was contradictory to Catholic doctrine. The Order influenced the teachings of the college, even on traditionally secular subjects. St. Joseph’s prohibited faculty from teaching ideas contrary to the position of the Catholic Church on matters of faith and morals. Faculty was required to promote the objectives and goals of the Catholic Church. Based on these characteristics, the Board concluded that asserting jurisdiction would present a significant risk of infringing on the First Amendment. Id.

In contrast, in Livingstone College, 286 NLRB 1308, 1310 (1987), the Board concluded that the relationship between Livingstone College and the AME Zion Church did not create a significant risk of constitutional infringement and asserted jurisdiction over Livingstone. In

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<sup>2</sup> In University of Great Falls, 331 NLRB 1663, 1665 (2000), the facts of which are more fully discussed at footnote 3, the Board concluded that it would continue to be guided by the Supreme Court’s decision in Catholic Bishop in cases raising First Amendment free exercise claims, notwithstanding the passage of the RFRA. Although the District of Columbia Court of Appeals rejected the Board’s test for asserting jurisdiction over church-operated schools in that case, the Court did so by applying Catholic Bishop rather than the RFRA. See University of Great Falls v. NLRB, 278 F.3d 1335, 1340 (D.C. Cir. 2002). In Ukiah Valley Medical Center, 332 NLRB 602 at fn 5 (2000), the Board distinguished cases involving the assertion of jurisdiction over church-operated schools from the church-operated hospital involved in that case. Accordingly, I conclude that I need not address the College’s RFRA arguments or its contention, based on principles of constitutional law, that Ukiah Valley Medical Center “is so off-the-mark that the Region is under no obligation to follow that holding until endorsed by the current Board.”

determining that Livingstone College was not church-operated within the meaning of Catholic Bishop, the Board emphasized the following facts: (1) Livingstone was not financially dependent upon the church; (2) only one-half of the board of trustees were required to be church members; (3) Livingstone's mission was primarily secular; (4) the faculty was not required to submit or support the bishops or promote the teachings of the church; and (5) the church did not influence course content or book selection. Id. at 1309-1310. The Board also noted that although the church owned Livingstone's property, appointed one-half of the board of trustees, and provided financial support to the college, those facts failed to raise serious constitutional issues. Id. at 1310.

Here, as in Livingstone, the Presbyterian Church's involvement with the College does not raise significant constitutional concerns. The College is not financially dependent on the Presbyterian Church. Approximately 70 percent of its revenue comes from tuition, and there is no evidence in the record that the Presbyterian Church gives financial support to the College. In addition, the Presbyterian Church does not own the College's property.

The Church does not exert any type of administrative control over the College. The trustees are not required to belong to the Presbyterian Church, currently only 1 out of 33 trustees is a Presbyterian minister, and the Church has absolutely no power to appoint trustees.

The College's mission is similar to the mission of Livingstone College. The College's mission statement describes the mission in primarily secular terms, "provid[ing] a superior educational opportunity for our students, one grounded in the liberal arts tradition and focused on career preparation and lifelong learning." Although the trustees approved a statement of Christian Purpose, the statement is couched in broad terms, does not discuss the Presbyterian Church specifically, and emphasizes academic freedom and openness to "all inquirers." The

covenant between the College and the Church is also couched in broad terms and specifically mandates that the College respect differing opinions.

Nothing in the articles of incorporation, bylaws, or covenant obligates faculty to promote the goals or values of the Presbyterian Church. In fact, the president testified that faculty members are free to speak their minds. There is no evidence that the Church could require dismissal of faculty for engaging in conduct contrary to the teachings of the Church, or for advocating ideas contrary to Christianity or the Presbyterian Church.

The Church does not interfere with the day-to-day administration of the College. The bylaws specifically prohibit the establishment of any rules that would limit the admission of students, appointment of faculty or election of trustees to members of the Presbyterian denomination. The College does not require students or faculty to engage in worship. There is no evidence that the Church exercises any influence over course content or book selection. Students are not required to take any classes specifically listed in the religious studies area.

While the College has a relationship with the Church, the preponderance of the College's characteristics indicate that the College is not "church-operated" within the meaning of Catholic Bishop. Since the College is not financially dependent on the Church, the Church has no administrative control over the board of trustees or the day-to-day operation of the College, faculty are not required to teach or promote the beliefs of the Church or Christianity, and the mission of the College is to provide a liberal arts education focused on career preparation, I find that asserting jurisdiction over the College does not create a significant risk of infringing on First Amendment Rights.<sup>3</sup>

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<sup>3</sup> I recognize that at least one United States Court of Appeals has rejected the Board's test for determining whether a college or university is exempt from its jurisdiction based on the Supreme Court's decision in Catholic Bishop. See University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). In that case, the District of Columbia Court of Appeals concluded that a college or university is an exempt institution if it "(a)



## **MANAGERIAL STATUS OF THE FACULTY**

### **General Governance Structure**

The current governance structure was created in May 2004 and first implemented in the fall of 2004. The board of trustees heads the College. The board of trustees has the power and authority to develop the mission statement, vision statement and strategic direction of the College; direct and prescribe the course of study; select and appoint a president; approve faculty appointments, tenure and promotion; establish admission requirements; and grant literary honors and degrees. Reporting directly to the board of trustees is Frank Falcone, the president of the College. The board of trustees appoints the president and has delegated to the president the responsibility of overseeing the operation and success of the College. Directly under the president is the provost, Dr. Lynn Bernier. The parties stipulated that the deans and area coordinators are administrators and properly excluded from the bargaining unit. The provost provides administrative overview and supervision of the academic programming at the College.

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holds itself out to the public as a religious institution; (b) is nonprofit; and (c) is religiously affiliated.” *Id.* at 1347-1348. I am, of course, bound to apply Board law in this case. However, even if I were to apply this three-part test, I would reach the same conclusion. With respect to the first element of the test, I recognize that the Church and the College are parties to a covenant that indicates they share several general principles, including offering a high quality education that is “committed to the wholeness of life interpreted and illumined by the Christian faith”; that the College’s mission statement provides that it “will demonstrate Christian values by our example”; and that the board of trustees has adopted a “Statement of Christian Purpose” that summarizes the College’s purpose as “for Christ and Learning” and indicates that its faculty is “dedicated to the Christian purpose.” However, I nonetheless conclude that such aspirational statements of principle and purpose are insufficient to establish that the College “holds itself out as providing a religious educational environment,” *Id.* at 1344, where, as here, there is virtually no other evidence of actual religious influence or control in the operation of the College or in the education that it provides to its students. With respect to the second element, the College is nonprofit, and therefore this element is met. Finally, with respect to the third element, the College and the Church are “affiliated” in the sense that they are parties to a covenant. However, unlike the relationship described in University of Great Falls, the Church does not sponsor the College, does not own its campus, and does not have any right of ultimate control over it. *Id.* at 1345. Thus, two of the three elements of the test adopted by the District of Columbia Court of Appeals in University of Great Falls are not met here. Accordingly, I conclude that even under that test the College is not a “church-operated school” within the meaning of Catholic Bishop.

The College is divided into two schools: (1) the school of liberal arts and science; and (2) the school of graduate and professional studies.<sup>4</sup> The two schools are further divided into three divisions: humanities and social science, health and natural science, and graduate and professional studies. A dean heads each division. The three division deans report to the provost and are responsible for managing the academic programming within their division. There are 27 academic disciplines within the three divisions. Seven area coordinators head the 27 academic disciplines.<sup>5</sup> The area coordinators are the lowest level of administration and act as intermediaries between the faculty and the deans. The parties stipulated that the foregoing are appropriately excluded from the unit. There are approximately 104 faculty members. The primary function of the faculty is to teach students. The faculty members teach an average of 12 academic credits (3 classes) per semester.

### **Faculty Committees**

Generally, faculty members participate in governance through membership on various faculty committees and by virtue of participation in the assembly, where faculty can vote on recommendations proposed by the various committees.<sup>6</sup> Faculty committees provide recommendations to the administration, but they have no power to formally approve or implement recommendations. While there are more than five faculty committees the evidence in

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<sup>4</sup> The two-school system was implemented in 2002. Previously the College was organized into one school with multiple academic departments.

<sup>5</sup> At this time only two of the seven area coordinator positions are filled. Before the structural changes, the College was divided into traditional departments each headed by a department chairman. The area coordinators replaced the department chairmen and are responsible for clusters of academic disciplines. For example, instead of a separate department chairman for the art department, theatre department, and music department, the College now has an area coordinator for fine arts.

<sup>6</sup> The assembly consists of faculty, students, and staff. The assembly votes on issues and gives their recommendations to the administration. Only faculty members can vote on issues related to academics or curriculum. Staff and students can vote on matters that do not deal with academics or curriculum.

the record concentrates on the following five faculty committees: (1) the faculty executive committee; (2) the academic steering committee; (3) the general education committee; (4) the admissions committee; and (5) the tenure and promotion committee.

### ***Faculty Executive Committee***

The faculty executive committee is composed of nine faculty members. The committee is responsible for appointing faculty to certain committees and nominating faculty for election to the other committees. The committee discusses the budget with the administration and gives recommendations to the administration concerning the faculty's budget priorities. The administration is not bound to follow the committee's recommendations, and there is no evidence in the record indicating how often its budget recommendations are implemented by the administration. The committee also discusses staffing levels with the administration and makes recommendations on whether academic disciplines are overstaffed or understaffed. The administration is not bound by the committee's recommendations on staffing levels, and there is no evidence indicating how often the committee's recommendations are implemented.

The committee also represents faculty interests and positions to the administration. For example, the committee formed a subcommittee to review the "roles and responsibilities" document created by the board of trustees. The subcommittee recommended several changes to the document. However, the president rejected the subcommittee's recommendations.

### ***Academic Steering Committee***

The academic steering committee is divided into two committees: the academic steering committee for the school of liberal arts and science and the academic steering committee for the school of graduate and professional studies. Each academic steering committee considers academic matters within its own school, and the two committees meet jointly to discuss matters

of joint interest. The academic steering committees review courses that are offered and make recommendations on the addition or deletion of majors, courses, and minors within their schools. In most cases, the committees are required to submit their recommendations to the faculty of their respective schools for a vote before their recommendation is given to the administration. Each academic steering committee is composed of five faculty members that are elected by the faculty. The provost sits on the academic steering committees, but is not a voting member.

### ***General Education Committee***

The general education committee is comprised of 10 faculty members that are elected by the faculty at large. The major responsibility of the committee is to supervise, evaluate, and improve the College's general education program. The general education program is a group of course requirements that all students must complete.

### ***Admissions Committee***

The admissions committee consists of four faculty members and two members of the admissions administration. The College uses an admissions formula that was originally designed by a faculty member and recommended by the faculty to determine whether to admit applicants. Applicants that meet the admissions formula are automatically accepted. Applicants that are not automatically accepted can apply for exceptional admissions. The committee is responsible for reviewing and making a final decision on whether to admit applicants that apply for exceptional admissions. There is no administrative review of the admission committee's decision.<sup>7</sup> The committee also reviews the admissions formula. The vice president of enrollment adjusts the formula and sets the range of scores that will automatically admit students.

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<sup>7</sup> In 1995, more than 20 students were directly admitted by the administration without meeting the admissions formula or being considered for exceptional admissions by the committee. The record is unclear as to why this happened and does not indicate that it ever happened again.

### ***Tenure and Promotion Committee***

The tenure and promotion committee is composed of six tenured faculty members that are elected by the faculty. The committee reviews the performance and qualifications of faculty up for tenure and/or promotion and makes recommendations on whether to grant or deny tenure and/or promotion.

### **Faculty's Involvement in Academic Governance**

#### ***Addition and Deletion of Majors***

The general process for changing majors or adding a major is as follows. A faculty member generates an idea and works on a proposal with other faculty and the vice president of enrollment to devise a business plan. In most cases division deans or area coordinators then review the proposal. For example, faculty in the history department have developed a proposal to create a public history major. They have submitted the proposal to the humanities and social science dean and are waiting for his approval before they can submit the proposal to the academic steering committee. The full proposal is then submitted to the academic steering committee. The committee then considers the proposal and recommends whether the proposal should be accepted. Then the proposal goes to the assembly for a faculty vote. The faculty's recommendation goes to the president and board of trustees for formal approval. In the past 11 years, eight new majors and two masters degree programs have been approved by the assembly and implemented by the administration. The provost testified that the general practice is that when a proposal is approved by the academic steering committees, the administration trusts the faculty and approves those majors.

However, the process outlined above is not always followed. For example, in 1998 the provost appointed faculty to an international education task force. The task force was charged

with making recommendations about future programming in international relations. The task force ultimately recommended to the administration that the College pursue a program in Latin American Studies and increase the study abroad program. These recommendations were never implemented by the administration.

A proposal to delete a major can come from either the faculty or the administration. For example, during the 1994/1995 school year, the College president and the administration determined that six majors were not cost effective and decided to eliminate the majors. The president asked the academic steering committee for its recommendation on whether the majors should be eliminated. The committee recommended that the College eliminate three of the majors and retain the other three. The committee's recommendation went to the general assembly for a faculty-wide vote. The assembly voted to retain all six majors. The president took all of these proposals to the board of trustees. The board of trustees and the president ultimately eliminated all six majors.

In about 2001, the College eliminated the social work department and major. Social work is a professional major that requires accreditation from the Council on Social Work Education to be successful in recruiting students and finding employment for graduates. The provost and the social work department chair jointly determined that they would not seek re-accreditation of the social work program because the accreditation process was too costly. After the administration decided not to apply for accreditation, the provost and department chair of social work went to the faculty assembly and proposed that the faculty support the elimination of the social work department. The social work department chair told the assembly that she supported the elimination of the department because without accreditation the major would not

attract students. The faculty assembly voted to eliminate the social work department and the administration implemented the decision.

### ***Addition and Deletion of Courses***

The actual procedure for adding courses to the curriculum may vary slightly in the different academic disciplines. Generally, when a faculty member has an idea for a new course, the faculty member works on developing the course with the dean, area coordinator or provost. The provost testified that there is significant interaction between the administration and the faculty member before the course proposal is submitted to the academic steering committee. In some academic disciplines, the division dean or area coordinator must approve the course proposal before it is submitted to the academic steering committee. The faculty member then submits the course proposal to either the liberal arts and science or graduate and professional studies academic steering committee. The committee then makes a recommendation on whether to approve the course. It appears that in recent history the majority, if not all, of the course proposals that have passed through the academic steering committee have been accepted by the administration. While the provost has the power to overrule the committee's recommendation, the provost testified that she has never done this because there is significant interaction between her and the faculty member prior to submitting the proposal to the committee. There was no discussion of course elimination in the record.

### ***Degree Requirements***

To earn a degree students must satisfy both general education requirements and their major requirements. An ad hoc faculty committee formulated the initial general education requirements in 1994 or 1995. The requirements were approved by the faculty-wide assembly, and then went to the board of trustees for final approval. Since the requirements have been in

place, no changes have been made, but the committee is currently considering whether changes should be made. The board of trustees has the authority to approve or reject the faculty's recommendations. The president testified that, ultimately, the board of trustees determines what is required in a degree for graduation.

### ***Enrollment, Class Size, and School Schedule***

The administration determines the enrollment limits, and the faculty has no input into the overall size of the student body. The provost works with the registrar to determine the maximum number of students that are allowed to take a specific course. The provost may consult with faculty about class size, but the ultimate determination is made by the administration.

The academic calendar—when the school year begins and ends—is determined by the administration. The faculty has no input into the yearly academic calendar. The division deans or area coordinators also determine when specific courses are offered and the times that they are offered.

The determination of whether the school year will be divided into semesters or quarters is an administrative decision. For example, sometime after 1993, the president and board of trustees changed the semester system from a 4-1-4 semester system to a traditional two-semester system. The one-month semester, called the J-term, took place in January and allowed faculty to teach extra courses. However, the president determined that the College would save money by changing to a regular two-semester system, and eliminated the J-term. Although the faculty assembly voted against the change, the president and board of trustees implemented it.



### ***Course Content and Classroom Policy***

The board's "statement on roles and responsibilities" delegates to faculty the authority to determine course content and teaching methods. The faculty designed the majority of courses in the course catalog.

The faculty manual mandates that faculty must create a syllabus for their classes, schedule four office hours per week, and establish attendance policies. The content of the syllabus is designed by faculty and does not need approval from administration. Faculty schedule their own office hours. Faculty members also design their attendance policy and decide the number of absences they deem acceptable. Grading scales and the grading of students is in the control of the faculty. The College does not impose a school-wide curve system.

### **Faculty's Involvement in Non-academic Governance**

#### ***Tenure***

Faculty members are considered for tenure after they complete a 5-7 year probation period. The area coordinator or dean (in the past, department chair) is responsible for nominating the candidate for tenure. The nominee then puts together a dossier and submits it to the provost and tenure committee. The tenure committee then holds a hearing at which the candidate puts forth evidence supporting her qualifications. The area coordinator and provost attend the hearing. At the completion of the hearing, the area coordinator and provost give their recommendations and then leave the room. The committee then deliberates and makes a recommendation on whether the candidate should be granted tenure. The committee gives its recommendation to the provost. The provost makes her own recommendation and gives both recommendations to the president. The president makes his own recommendation and gives all of the recommendations to the board of trustees for consideration. The president testified that

when formulating his recommendation, he follows the committee's recommendation with respect to teaching ability, but must consider budget, enrollment patterns, and the need for tenured faculty when formulating his recommendation. Between 1993 and 2004, 35 faculty members were up for tenure. The administration did not follow the committee's recommendations in seven cases. In six of those cases the faculty recommended tenure, but the administration denied tenure. And in one case, the faculty did not recommend tenure, but tenure was granted by the administration.

### ***Promotion***

The process of promoting faculty (when the promotion does not involve tenure) is quite similar to the tenure process. The candidate submits documents to the tenure committee for review. The committee reviews the documents and holds a hearing at which the candidate testifies about her qualifications. The committee then makes a recommendation to the provost; the provost makes a recommendation to the president, who passes it on to the board for final approval. The administration has approved all of the faculty's promotion recommendations that do not involve tenure. However, there is no evidence as to how many promotions were approved in the past 11 years.

### ***Reappointment of Non-tenured Faculty***

The area coordinator (in the past, department chair) reviews the performance of the faculty member by using the "Annual Goals and Evaluation Report." The area coordinator then recommends to the provost whether the faculty member should be reappointed. The faculty members play no role in this process.

### ***Hiring of Faculty***

The faculty in an academic discipline are involved in hiring faculty for their specific discipline. When a position opens, the faculty members identify the need to hire and ask the provost for permission to hire. The provost and president determine whether to authorize hiring based on the budget and need for a specific position. They also determine whether to hire for a tenure track or a non-tenure track position. Once permission to hire is given, the faculty members generate a job description with the assistance of the area coordinator. The provost then reviews the job description and makes suggestions. The faculty then posts the job description and reviews the applications. The faculty then gives the area coordinator a list of individuals they want to interview. The area coordinator gives the list to the provost, and the provost authorizes the faculty to set up interviews. In most cases the candidate interviews with the entire faculty in the discipline, the director of human resources, the provost, and the faculty president. The faculty members then get together and pick a candidate and give their choice to the area coordinator. The area coordinator then passes the choice on to the provost. The provost testified that, while it is unlikely, the area coordinator could override the faculty's choice. The provost then calls and makes the offer to the candidate and negotiates salary with the candidate. There is no evidence indicating that the provost has ever denied the faculty's recommendation.

There is evidence that, in the education division, the area coordinator expanded one part-time position to a full-time, non-tenured position without faculty involvement. There is also evidence that four full-time, non-tenured education faculty were hired by the area coordinator and department chair without faculty input.

### ***Hiring Administrators***

The faculty is not involved in the decision to hire deans, area coordinators, or the provost. For example, when the president was looking to fill the position of chief academic officer (now the provost), the faculty requested that he conduct a nationwide search. The president did not conduct a nationwide search and hired from within the College.

### ***Budget***

While the administration consults with the faculty executive committee about the budget, the administration has ultimate control over the budget. The faculty executive committee has no power to request certain budget amounts or make changes or additions to the budget. The division dean or the area coordinator controls the academic disciplines' budgets. For example, the education program's budget is determined by the division dean without faculty input.

### ***Staffing Levels***

The faculty executive committee discusses staffing levels with the provost and gives its recommendations on whether academic disciplines are overstaffed or understaffed. The provost is not bound to follow its recommendations and does not in practice routinely follow the committee's recommendations. For example, in 2003, the committee determined that the faculty was understaffed by 10 positions. The committee recommended that the administration approve hiring for four specific positions. The provost rejected the committee's recommendation and hired nursing faculty instead.

### ***Terms of Employment***

Conditions of employment are within the discretion of the administration. The administration determines benefits and salary increases for employees. For example, when a professor is hired, the professor and provost negotiate salary. The administration also determines

whether faculty members are eligible for salary increases, the amount of salary increases, and the manner in which salary increases are distributed. Benefits are the same for all faculty members.

### ***Structural Changes to the College***

The administration decided to change the structure of the College from one school to two schools in about 2000. The trustees approved the structural change before the change was submitted to the faculty for a vote. In the spring of 2002, by a 2:1 margin, the faculty voted against forming two separate schools. None of the faculty committees was given an opportunity to make recommendations about a two-school system. In 2002, the administration implemented the two-school system despite the faculty's opposition.

The move to a two-school system eventually led to a faculty-wide vote of no confidence in the president in 2003. The board of trustees responded to the faculty's no confidence vote by affirming their confidence in the president.

In 2004, the administration changed the structure of the college by creating three divisions and heading the divisions with deans, replacing departments with academic disciplines, and replacing department chairs with area coordinators. The administration made these changes without input from the faculty committees or faculty assembly. After the changes were implemented, the faculty executive committee communicated to the president that they did not approve of the structural changes and asked the board of trustees' academic affairs committee to review disputed issues. However, the board of trustees and president determined that changes were not curricular in nature and, therefore, could not be reviewed by the board of trustees' academic affairs committee.

## **Legal Standard**

In NLRB v. Yeshiva University, 444 U.S. 672 (1980), the Supreme Court held that University faculty members were managerial employees excluded from the Act's coverage. The Court defined managerial employees as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Id. at 682, quoting NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). The Court concluded that the faculty in that case were managerial because "their authority in academic matters is absolute." Yeshiva, 444 U.S. at 686. In finding that the Yeshiva faculty's academic authority is absolute, the Court relied on evidence that the faculty, through participation in meetings and committees, determined each school's curriculum, academic calendar, course schedules, admissions and matriculation standards, teaching methods, and grading policies; and sometimes determined tuition, the size of the student body, and the location of the school. Id.

Since Yeshiva, the Board has held that faculty's participation in the formulation of academic policy is the primary indicator of managerial status and that faculty's authority in nonacademic areas such as tenure, hiring, and promotions, is less significant. University of Dubuque, 289 NLRB 349, 352 (1988); Livingstone College, 286 NLRB 1308 at 1314. While participation in academic policy is important, faculty cannot be excluded from the Act's protection merely because they "determine the content of their own courses, evaluate their own students and supervise their own research." Yeshiva, 444 U.S. at 688 fn.31.

While the faculty in Yeshiva exercised final and absolute authority over academic policy, effective recommendation or control over academic policy is enough to establish managerial status. Faculty effectively recommend academic policy where the administrative hierarchy routinely approves nearly all of the recommendations, without independent review. Lewis &

Clark College, 300 NLRB 155, 163 (1990). The party seeking to exclude the faculty as managerial has the burden of presenting the evidence necessary to establish such exclusion.

Montefiore Hospital & Medical Center, 261 NLRB 569, fn.17 (1982).

### **The Faculty Does Not Effectively Recommend Academic Policy**

The faculty participates in academic governance through membership on faculty-dominated committees and participation in the assembly. The controlling issue, then, is whether the committees effectively recommend or determine academic policy or action. The College argues that faculty members are managerial employees because they effectively recommend and/or determine what courses the college offers, the content of the courses, and who is admitted to the College.

The general education committee and the academic steering committee make recommendations in the key matters of degree requirements, curriculum, and the addition or deletion of majors and courses. The current general education requirements were developed and recommended for approval by the faculty on the general education committee. The administration followed the committee's recommendations and implemented the requirements. However, as the president testified, the board of trustees has the authority to approve or reject any of the committee's recommendations, and the board of trustees ultimately determines what is required in a degree for graduation.

The academic steering committee makes recommendations to the administration about whether to add or delete majors. The provost testified that generally when a proposal is approved by the academic steering committee, the administration trusts the faculty and approves those majors. However, when a faculty member proposes a new major, there is significant administration involvement before the proposal is submitted to the committee. The faculty

member must work with the vice president of enrollment to devise a business plan for the major. In some academic areas the division dean or area coordinators must approve the proposal before it is submitted to the academic steering committee for consideration. While the steering committee's recommendations are usually followed by the administration, the recommendations are only advisory and must be implemented by the administration.

In cases where the Board has found that the faculty exercise managerial authority, the administration does not exercise significant independent review of faculty recommendations. See Elmira College, 309 NLRB 842 (1992) (finding managerial status where the faculty committees established curriculum, and faculty had final authority to add courses to the curriculum); University of Dubuque, 289 NLRB 349 (finding managerial status based largely upon findings that faculty as a whole had the exclusive right to "initially receive and consider new degree programs; and develop, recommend, and ultimately approve curricular content and course offerings"). In contrast, here the administration can prevent a faculty proposal from ever going to a steering committee, and the administration has power to independently review the steering committee's recommendation.

Moreover, the administration does not routinely approve faculty recommendations with respect to the addition or deletion of majors. For example, in 1995, the administration specifically rejected the recommendations of both the academic steering committee and the faculty assembly and eliminated six majors. In 1998, the administration rejected a faculty task force's recommendation to create a program in Latin American Studies. The administration's failure to follow faculty recommendations in the crucial area of eliminating or adding academic majors indicates that the faculty does not effectively recommend curricular policy.<sup>8</sup> See St.

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<sup>8</sup> In support of its position, the College points out that the faculty recommended to eliminate the social work department and that the administration implemented the faculty's decision. However, the genesis of the idea to



Thomas University, Inc., 298 NLRB 280, 286 (1990) (concluding that faculty are not managerial in part because the administration unilaterally established a law school and eliminated entire degree programs without the faculty's approval).

Turning to the addition of new courses, there is evidence that the majority—if not all—of the academic steering committee's recommendations have been approved by the administration. However, the administration is significantly involved in the process of formulating the new course. At the beginning of the process the faculty member works closely with the administration to develop the new course. In some academic disciplines, the division dean or area coordinator must approve the faculty's proposal before the faculty member can submit the proposal to the academic steering committee. Thus, at the early stages, the administration independently reviews faculty proposals and can prevent proposals from ever being considered by the academic steering committee. The provost testified that she has never overruled the committee's recommendation to add a course and in her testimony attributed this to the significant interaction between herself and the faculty before the proposal is submitted to the academic steering committee. Thus, I find that the evidence is insufficient to establish that faculty members effectively control the creation of new courses. Rather, the administrators are relied on for their independent review of course proposals before they are ever considered by the academic steering committee, and the committee's final recommendation is subject to review by the provost, president and trustees. See Lewis and Clark, 300 NLRB at 163 (stating that “evidence that the administrators are relied upon for their independent review and recommendation regarding academic matters” establishes that the faculty are not managers); see

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eliminate the social work department came jointly from the provost and the department chair of social work. Thus, in the case of the social work department, the faculty went along with the administration's recommendation to eliminate the department.

also Loretto Heights College, 264 NLRB 1107 (1982), *enfd.* 742 F.2d 1245 (10<sup>th</sup> Cir. 1984) (concluding that even though faculty's recommendations on new courses were routinely accepted by the administration the faculty members were non-managerial in part because they had no final or absolute authority, the faculty's actions were in the form of recommendations or advice, and the large administrative staff acted as a buffer).

With respect to course content and classroom policies, the record is clear that faculty members determine the content of the courses they teach. The provost testified that the faculty designed the majority of the courses in the course catalog. Faculty members also determine their office hours, design their syllabi, and create their attendance policies. However, these factors are insufficient to establish that faculty exercise managerial authority. Yeshiva, 444 U.S. at 690 fn.31 (faculty cannot be excluded from the Act's protection merely because they "determine the content of their own courses, evaluate their own students and supervise their own research."). Additionally, there is evidence that faculty do not have control over other important aspects of their classroom policy. Faculty members do not determine or effectively recommend their class size, the day and time their courses will be scheduled, or the academic calendar. In fact, over strong faculty objections, in 1993, the administration changed the semester system from a 4-1-4 system to a traditional two-semester system.

Turning finally to the faculty's authority over admissions, I find that the faculty on the admissions committee effectively determine the admission of students who fall below the traditional admissions standards but nonetheless warrant consideration.<sup>9</sup> A faculty member was also involved in creating the admissions formula. The admissions committee approved the

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<sup>9</sup> While there is evidence that in 1995 over 20 students that did not satisfy the admissions formula were admitted by the administration without being considered by the admissions committee, there is no evidence that this is a regular occurrence.

formula and is responsible for reviewing the formula. While these facts indicate that faculty exercise authority over admissions, I am unaware of any case that holds that effective control in the area of admissions alone is determinative of whether the faculty are managerial.

Additionally, the faculty's authority over admissions is tempered by the administration's authority to adjust the admissions formula to decide what range of scores will automatically admit students and its authority to set enrollment limits and determine the overall size of the student body.

For the reasons discussed above, I find that the evidence is insufficient to warrant a conclusion that the faculty effectively recommends or determines academic policy.

#### **The Faculty Does Not Effectively Recommend Non-academic Policy**

Effective recommendation of employer policy in non-academic areas is less significant in ascertaining managerial status. University of Dubuque, 289 NLRB at 353. In fact, effective recommendation in non-academic areas such as tenure and promotion does not require a conclusion that faculty exercise managerial authority. Loretto Heights, 264 NLRB 1107 (holding that faculty was not managerial despite evidence that faculty dominated committee's recommendations on hiring, tenure and promotion were always followed by the dean). Here, a review of the faculty's authority over hiring, tenure and promotion, budget and staffing levels, terms of employment and structural changes indicates that the faculty does not exercise managerial authority over non-academic matters.

Faculty members participate in the hiring of faculty members in their specific academic discipline by designing job descriptions in conjunction with area coordinators, posting job announcements, reviewing applications, participating in the interview process, and giving their hiring recommendations to the area coordinator. However, the faculty does not exercise hiring

authority independently of administrative review. The decision to hire and whether to hire tenure track or non-tenure track is made exclusively by the president and provost. Additionally, the provost is intimately involved in the hiring process. The provost reviews the job description; authorizes the faculty to set up interviews with specific candidates; interviews the applicants; and, importantly, makes the offer to the candidate and negotiates the salary with the candidate. Thus, the provost is involved in every step of the hiring process and is solely involved in the critical final step of offering a candidate a position and negotiating the terms of that offer.

Tenured faculty members, through the tenure and promotion committee, review the performance of faculty and make tenure recommendations to the provost. In the last 11 years, the committee has made 35 tenure recommendations, and the administration did not follow the committee's recommendation in seven of the cases. I find that this does not constitute effective recommendation with regard to tenure. Compare Elmira, 309 NLRB at 846 (finding that the faculty effectively recommended tenure where the administration followed the faculty's recommendations 45 out of 46 times). While the administration has approved all of the committee's recommendations with regard to promotions that do not involve tenure, I am unaware of any authority that stands for the proposition that because a faculty committee makes effective recommendations concerning a non-academic area, this is sufficient to confer managerial status on the faculty as a whole.

The administration's relatively recent implementation of two structural changes illustrates the faculty's lack of managerial authority. In 2002, the administration changed the structure of the College from one school to two schools despite faculty opposition to the change. In 2004, the College restructured the administration system without input from the faculty committees or assembly, and later rejected the faculty's request to review the decision. Finally,

the record is clear that faculty members do not determine or make effective recommendations with respect to re-appointment of non-tenured faculty, hiring administrative employees, budget, terms of employment, salary increases, and staffing levels. For the above reasons, I find the College has failed to meet its burden of demonstrating that faculty exercise managerial authority over non-academic matters.

## **SUPERVISORY STATUS OF FACULTY**

### **Legal Standard**

The College argues that all faculty members are supervisors within the meaning of the Act because they effectively recommend whom to hire and promote, who is granted tenure, and effectively determine their classroom work life. It is the College's burden to establish that the faculty are supervisors within the meaning of Section 2(11) of the Act. Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip. op. at 2 (2003).

Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

An individual need possess only one of the enumerated indicia of authority in order to be encompassed by Section 2(11), as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment. "[T]he employee is [not] required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor." NLRB v.

Roselon Southern Inc., 382 F.2d 245, 247 (6<sup>th</sup> Cir. 1967). However, only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985) enfd. in relevant part 794 F.2d 527 (9<sup>th</sup> Cir. 1986). Therefore, an individual who exercises some "supervisory authority" only in a routine, clerical, or perfunctory manner will not be found to be a supervisor. Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986).

### **The Faculty Members Are Not Supervisors Under Section 2(11)**

The College has failed to introduce sufficient evidence to satisfy its burden of showing that the faculty as a whole exercises independent authority with respect to hiring, tenure, or promotions. In C.W. Post Center of Long Island University, 189 NLRB 904 (1971), the Board considered whether faculty who collectively made recommendations to the administration concerning hiring, tenure, and promotion were not supervisors within Section 2(11). The Board held that quasi-supervisory authority that adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of the Act. Id. Here, with respect to hiring, only the faculty in the specific academic discipline that is filling a position has any input in the process. Moreover, there is no evidence in the record concerning how often faculty members in each academic discipline participate in the hiring process. With regard to tenure and promotion, only tenured faculty members that actually sit on the committee participate in the process. In the last 11 years, only 35 people have been considered for tenure, and there is no evidence indicating the number of faculty members that have been considered for promotion. I am not aware of any case in which the Board has held that an entire faculty is supervisory because some faculty members on a sporadic basis participate in hiring, tenure and

promotion decisions. Thus, based on this record, I cannot find that the faculty as a whole are supervisors under the Act. See Detroit College of Business, 296 NLRB 318 (1989) (noting that the Board will continue to view time spent in the performance of supervisory duties relevant, but not controlling, to its analysis of supervisory status).

Even if the faculty could be considered as a whole, there is no evidence that the faculty exercises any Section 2(11) authority without administrative involvement. With respect to hiring, as discussed above, faculty members make hiring recommendations, but their recommendations are independently reviewed by the area coordinator and the provost. The provost participates throughout the hiring process by granting approval to hire and to interview candidates, interviewing the candidates, and ultimately negotiating salary with the candidates. Similarly, the president and provost independently review the tenure and promotion committee's recommendations. In seven out of the 35 most recent cases, the administration has rejected the committee's tenure recommendation. The administration has consistently accepted the committee's recommendations with regard to promotions that do not involve tenure. However, I cannot find that the faculty as a whole exercises supervisory authority over promotions where the individual faculty members participate on the committee for a limited amount of time, the committee changes membership, and there is no evidence regarding how often the committee makes promotion recommendations.

Finally, the College contends that because the faculty members control their workloads and classroom policy, the faculty members are supervisors within the Act. The College's argument is unpersuasive. Controlling workload and establishing classroom policy goes to the professional status of the faculty; these characteristics do not indicate that faculty members possess or exercise supervisory authority over employees. Accordingly, I find that the Employer

has not established its burden with respect to showing that the full-time and regular part-time tenured and non-tenured faculty members are supervisors within the meaning of the Act.

### **COMMUNITY OF INTEREST OF LIBRARIANS**

The evidence in the record concerning librarians is sparse. At the conclusion of the hearing, the hearing officer gave the parties an opportunity to submit additional evidence regarding the librarians and their community of interest or lack thereof with the faculty. Both parties declined. As a result, there is insufficient evidence in the record to determine whether the librarians share a community of interest with the faculty, and therefore the librarians shall be permitted to vote subject to challenge.<sup>10</sup>

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time tenured and non-tenured teaching faculty employed by the Employer; excluding administrators, deans, adjunct faculty, all other employees, managerial employees, and guards and supervisors as defined by the Act.

\*Professional and reference librarians shall be permitted to vote subject to challenge.

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<sup>10</sup> The College raises for the first time in its post-hearing brief the status of Susan Lewis, the faculty development coordinator. The College contends that she is a managerial employee and must be excluded from the unit because she exercises independent professional judgment in dispensing travel and research grants. Because the College raised this issue for the first time in its post-hearing brief, the Petitioner has not had an adequate opportunity to respond or to submit evidence about this issue. Accordingly, Susan Lewis shall be permitted to vote subject to challenge.



## **DIRECTION OF ELECTION**<sup>11</sup>

An election by secret ballot will be conducted by the Milwaukee Regional Office among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>12</sup>

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<sup>11</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14<sup>th</sup> Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 27, 2005. Copies of any such request for review filed with the Board shall also be filed with the Minneapolis and Milwaukee Regional Offices.

<sup>12</sup> To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Milwaukee Regional Office within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Milwaukee Regional Office shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Milwaukee

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - UAW**.

Signed at Minneapolis, Minnesota, this 13<sup>th</sup> day of January, 2005.

/s/ Ronald M. Sharp

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Ronald M. Sharp, Acting Regional Director  
Thirtieth Region  
National Labor Relations Board  
330 South Second Avenue, Suite 790  
Minneapolis, Minnesota 55401

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Regional Office, Henry S. Reuss Federal Plaza, Suite 700, 310 West Wisconsin Avenue, Milwaukee WI 53203 on or before close of business January 20, 2005. No extension of time to file this list may be granted by the Acting Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.